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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1929

In Equity No. 338.

FRANK H. DOHANY,

Appellant,

VS.

FRANK F. ROGERS, State Highway Commissioner for the State of Michigan; the DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, a Michigan Corporation; and the H. W. NELSON COMPANY, of Chicago, Illinois, a foreign corporation,

Appellees.

BRIEF OF THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY AND THE H. W. NELSON COMPANY, APPELLEES.

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BRIEF OF THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY AND THE H. W. NELSON COMPANY, APPELLEES.

I.

JURISDICTION.

The Parties Defendant Have Ceased to Exist and Appellant Did Not Substitute Their Respective Successors. Therefore, This Is a Moot Case and Should Be Dismissed.

The Attorney General has pointed out (page 8 of his brief) that the defendant Rogers resigned as State Highway Commissioner on January 1st, 1929, and that

another was appointed to fill the vacancy, which other has since been elected to the office for a full term. Also, the Detroit, Grand Haven and Milwaukee Railway Company has ceased to exist because of having consolidated with other railroad companies to form the Grand Trunk Western Railroad Company. The consolidation became effective November 1st, 1928, and on November 8th, 1929, the consolidated company was authorized by the Interstate Commerce Commission to operate the lines of railroad formerly owned and operated by the several constitutent companies, including those of the Detroit, Grand Haven and Milwaukee Railway Company.

Unification and securities of Grand Trunk Western Railroad Company, I. C. C. Finance Docket No. 7320[1], *decided November* 8, 1929.

The appointment and subsequent election of a successor to the defendant Rogers, as State Highway Commissioner, is a matter of public record in the office of the Secretary of State of Michigan. The record of the consolidation of the Detroit, Grand Haven and Milwaukee Railway Company with other railroad companies to form Grand Trunk Western Railroad Company is a matter of public record in the offices of the Secretaries of State of Michigan and Indiana. These are matters of which the court will take judicial notice, and the order of the Interstate Commerce Commission in respect of the consolidation is also a public record of which the court will take judicial notice.

Caha v. United States, 152 *U. S.* 211, 38 *L. Ed.* 415, 14 *Sup. Ct.* 513.

Jenkins v. Collard, 145 *U. S.* 546, 36 *L. Ed.* 812, 12 *Sup. Ct.* 868.

Knight v. U. S. Land Ass'n, 142 *U. S.* 161, 35 *L. Ed.* 974, 12 *Sup. Ct.* 258.

Thompson v. Missouri Pacific R. R. Co., 15 *Federal (2nd)* 28.

Goulette's Adm'r v. G. T. Ry. Co., 93 *Vt.* 266, 107 Atl. 118.

Yet appellant has made no motion to substitute the successor in office of the State Highway Commissioner or Grand Trunk Western Railroad Company, successor to Detroit, Grand Haven and Milwaukee Railway Company, as parties defendant, and for an order permitting the cause to be continued and maintained against such successors.

Therefore, this cause of action has abated as to the State Highway Commissioner and Detroit, Grand Haven and Milwaukee Railway Company, and the matters argued in appellant's brief have now become moot questions. For this reason the bill should be dismissed.

United States Sup. Ct. rule No. 17, *paragraph* 4.

U. S. C. A. title 28, *section* 780.

Oklahoma Natural Gas Co. v. the State of Oklahoma, 273 *U. S.* 257, 47 *Sup. Ct.* 391, 71 *Law Ed.* 634 *(Oklahoma* 1927).

II.

STATEMENT OF THE CASE.

The Statement of the Case as Contained on Pages 2 and 7, Inclusive, of Appellant's Brief Is Erroneous in Several Important Particulars.

No extended discussion of the facts will be here attempted, but we shall confine ourselves to pointing out

to the Court those errors in the facts as stated in appellant's brief which are material to the issues to be discussed.

The first paragraph on page 2 of appellant's brief is so worded as to give the impression that the main consideration for the acquiring by the State of a new right of way to be later conveyed to the Railway Company is to be the surrender by the Railway Company to the State of its special charter, whereas the main consideration is the agreement by the Railway Company to convey to the State its present right of way in order that the State may be permitted to widen and otherwise improve a State Trunk Line Road.

The public highway mentioned in plaintiff's bill of complaint, known as Woodward Avenue, runs northwesterly from Detroit, a distance of approximately twenty miles, to Pontiac, Michigan. It is a Federal aided road and has been designated as U. S. Road No. 10. It has been, and is, by statute, a State Trunk Line Road.

Act No. 334 *of the Public Acts of* 1913 *of the State of Michigan.*

Act No. 12 *of the Public Acts of* 1925 *of the State of Michigan.*

The construction, improvement and maintenance of it is now, and since 1913 has been, under the supervision, direction and control of the State Highway Commissioner.

Act No. 334 *of the Public Acts of* 1913 *of the State of Michigan.*

Act No. 19 *of the Public Acts of* 1919, *as last amended by Act No.* 257 *of the Public Acts of* 1921 *of the State of Michigan.*

The State of Michigan pays the entire cost of such construction, improvement and maintenance.

Act No. 17 *of the Public Acts of* 1925 *of the State of Michigan.*

In the construction, improvement and maintenance of said highway, the State Highway Commissioner acts as an agency of the State in the performance of a governmental function.

Gunther v. Board of County Com'rs of Cheboygan County, 225 *Mich.* 619.
Longstreet v. Mecosta County, et al., 228 *Mich.* 542.

Said public highway is one of the most heavily travelled roads in the State of Michigan, or in the United States, and in 1924 the State undertook the improvement thereof by widening it to a width of 200 feet and paving it with two slabs of 40-foot concrete with curbs, gutters, parking spaces, etc. The project has now been completed except from Royal Oak to Bloomfield Center, all in Oakland County, Michigan, where the railroad right of way and tracks of the Detroit, Grand Haven and Milwaukee Railway Company adjoins the highway and right of way on the northeasterly side. In order to complete the widening, in accordance with the plans and specifications of the State Highway Commissioner, it is necessary for the State to acquire the present railway right of way between said points (pages 59-60).

The Railway Company is a common carrier engaged in interstate and intrastate commerce and in order to perform its functions as such carrier, it must either retain its present right of way or acquire a new one before surrendering it for highway purposes.

Act No. 340 of the Public Acts of 1927 of the State of Michigan and the Contract between the State and said Detroit, Grand Haven and Milwaukee Railway Company, dated July 20, 1927, provided for the securing by the State of a new right of way, the grading thereof and the laying of a single track railroad thereon, after which is to be conveyed to the Grand Trunk Western Railroad Company, successor by consolidation to Detroit, Grand Haven and Milwaukee Railway Company, in exchange for the Company's present right of way required by the State for said public highway widening. The surrender by the Railway Company of its special charter and its undertaking to become subject to the General Tax Laws of the State are incidental to the main purpose of the Agreement and Act.

The Railway Company, itself, has had nothing to do with the widening of Woodward Avenue and has at no time been engaged in relocating its right of way or in acquiring property by purchase or condemnation for such purposes. Its only interest and concern is as disclosed in the contract itself, and arises out of the obvious fact that it cannot operate as a common carrier without an adequate right of way, and if the State of Michigan wishes to acquire the present railway right of way for public highway purposes, a new right of way must first be acquired and equipped to substitute therefor.

On the bottom of page three of appellant's brief it is said that the State Highway Commissioner, at a hearing to determine the necessity of the public highway improvement, held on April 14, 1928, announced, among other things, that the Highway Condemnation Act, so-called:

> "Does not authorize the allowance of any consequential damages, or damages for diminution of the value of the remainder of the tract of land from which land for right of way purposes is taken."

The allegation to this effect in plaintiff's bill of complaint is denied in the answers of the State and the Railway Company (Record, pages 48 and 61) and the Attorney General and counsel for the Railway Company have repeatedly, in open court, as well as in briefs and pleadings, asserted that said Act does allow damages for diminution in value, if any, of a remainder of a tract of land from which a portion is taken for public highway purposes, under the provisions of the General Highway Condemnation Act which is under attack in this case. We say so now to this Court. Furthermore, the Supreme Court of the State of Michigan has interpreted said Highway Condemnation Act (Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927) as requiring such an allowance of consequential damages.

In the case of Fitzsimons and Galvin, Inc., vs. Rogers, 243 Mich. 649, 664, the Court said, with reference to the same procedure as is under consideration in this case:

> "In the present case, as in an ordinary proceeding for condemning a right of way for a railroad, it will be the duty of the commissioners 'to compensate the owner for what his landed interest will suffer from the use proposed to be made of it by the Railroad Company.' *Barnes v. Railway Company,* 65 Mich. 251. Adequate compensation is such only as puts the injured party in as good a condition as he would have

been in if the injury had not been inflicted. It includes the value of the land or the amount to which the value of the property from which it is taken is depreciated."

The same question was also before the Court in the case of Johnstone v. Detroit, Grand Haven & Milwaukee Railway Company, et al., 245 Mich. 65, 68, and the Court there said:

> "It is the rule that where the whole of land is taken, the compensation to be made is the fair value of the land. Where only a part is taken such compensation is not measured by proportionate acreage, but by the amount to which the value of the property from which it is taken is diminished. *Grand Rapids, etc., R. Co. v. Heisel*, 47 Mich. 393. The value of the part actually taken is allowed as direct compensation; but the decreased value of the residue of the parcel, on account of the use made of the land taken, is also allowable as compensation even though it is strictly consequential damage in nature. *Sharp v. U. S.*, 191 U. S. 341 (24 Sup. Ct. 114); 2 Nichols on Eminent Domain, 2nd Edition, Section 236."

It is important that the Court keep in mind that consequential damages, so-called, or diminution in the value of the remainder of plaintiff's land by reason of the use to which the part taken is to be devoted, is, and, in the condemnation proceedings now pending and sought to be enjoined by this suit, will be considered as a proper element of damages to be considered by the Court Commissioners appointed to determine the total compensation which shall be paid to plaintiff as dam-

ages for the taking of a portion of his land. A litigant can be heard to question the validity of a statute only when and in so far as it is applied to his disadvantage.

Rindge Co., et al., v. Los Angeles County, 262 *U. S.* 700; 43 *Sup. Ct.* 689.
Dahnke-Walker Co. v. Bondurant, 257 *U. S.* 282, 289, 42 *Sup. Ct.* 106, 66 *L. Ed.* 239.

On page four of appellant's brief, mention is made of the proposed yards and the resultant damage on account thereof. Aside from the fact that it is not proposed to use said yard for the making and breaking of trains, but only for the storing of cars for the service of local shippers in the Village of Birmingham (there are no industries in said village), the matters mentioned only go to the question of amount of damages. They will be considered by the Court Commissioners, but should not be considered by this Court, in determining the issues of this case.

On the bottom of page 4 of appellant's brief certain figures are given in an attempt to show that the State Highway Commissioner did not in fact consider any consequential damages to the remainder of plaintiff's land. As a matter of fact, plaintiff's land is not worth $3,250 per acre. The evidence submitted to date before the Court Commissioners who are now hearing the parties to determine the compensation to be paid is to the effect that plaintiff's land is not worth more than $2,200 per acre. Obviously, therefore, the State Highway Commissioner either allowed some consequential damages to the remainder of plaintiff's land or considered the land taken to be worth $3,250 per acre, but believed that the balance of his land would not be depreciated. The evidence before the Court Commission-

ers to date is to the effect that the balance of his land will not be depreciated in value, but will in fact be benefited.

The balance of appellant's statement of the case is misleading when considered alone, but the Attorney General's brief contains an accurate statement which, when considered with the matters hereinabove stated, will be sufficient to advise the Court of the controlling issues in the case.

III.

The Three-Judge Statutory Court Below Had Jurisdiction to Entertain Plaintiff's Motion to Dismiss the Bill of Complaint.

This subject is discussed on pages 20 and 21 of appellant's brief where certain cases are cited and quoted from. All of said cases were decided before the amendment to Section 266 of the Judicial Code (U. S. C. A., Title 28, Section 380) of February 13, 1925, C. 229, Section 1, Stat. 938, which provides that "the requirements respecting the presence of three judges shall also apply to the final hearing in such suit in the District Court." The three judges, therefore, now have power to dismiss a bill of complaint, whereas prior to the 1925 amendment and at the time the cases referred to by appellant were decided, they had no such power and said cases are not authority in causes arising after the amendment, such as the case at bar.

While counsel for appellant contends (page 20 of his brief) that the order dismissing the bill "does not purport to be authorized or sanctioned by either or both of the other two judges who heard the case," and that (page 21 of his brief) "there is no showing in the record

that the Court thus composed authorized or directed the single District Judge to enter a decree tested by himself," the opinion of Tuttle, District Judge, concurred in by Moinet, District Judge, expressly says that "the temporary restraining order now in effect must be dismissed, the application for an interlocutory injunction denied and the bill dismissed" (R. p. 77) and the opinion of Hickenlooper, Circuit Judge, concludes with this statement, "I concur in the dismissal of the plaintiffs' bills" (R. p. 83).

Therefore, all three judges did authorize and sanction in writing the dismissal of the bill, and we submit that the written opinions filed in this cause are of at least as binding force and effect, and should be considered much more so, as authorizing and sanctioning an order dismissing the bill as though the three judges were all present in a court room together and verbally directed the entering of such an order. The signed written opinions of the three judges concurring in the dismissal was sufficient to authorize the entering of the order in this case.

If, however, the order denying the application for an interlocutory injunction and dismissing the bill of complaint was not authorized and is not a valid order, then there was nothing for appellant to appeal from and he should have submitted to the three judges an order for their signatures and, upon their refusal to sign the same, to have proceeded by mandamus. Not having done so, this Court, if it should determine that the order complained of is void, can only send the case back for the entering of a proper order in accordance with the opinions of the three judges.

IV.

The Necessity for Taking Appellant's Property Through the Power of Eminent Domain Is Not an Issue in This Case.

The power of eminent domain does not depend for its existence on a specific grant in the Constitution. It is inherent in sovereignty and exists in a sovereign state without any recognition of it in the Constitution. The provisions found in most state constitutions relating to the taking of property for the public use do not by implication grant the power to the government of the state, but limit a power which would otherwise be without limit. The power existed in each of the thirteen states ,immediately on the assumption of independence; and on the admission of a new state such state at once became entitled to, and possessed of, all the rights which belonged to the original states, including the power of eminent domain, free from any restrictions except those contained in its constitution and that of the United States.

10 *R. C. L.* 11-12.

The right of eminent domain does not rest on a statute or on a constitutional enactment.

In re Rugheimer, 36 *Fed.* 369.
Shoemaker v. U. S., 147 *U. S.* 282.
Loomis v. Hartz, 165 *Mich.* 662.
1 *Nicholson Eminent Domain*, 27.

In the Loomis case, supra, the Supreme Court of Michigan said:

> "It should be borne in mind that each state, by virtue of its statehood, has the right to exercise the power of eminent domain. Barron v. Baltimore, 7 Pet. (U. S.) 243."

Elliott on Roads and Bridges, p. 240, says that:

> "The right is founded in necessity and guarded and restricted, *but not created,* by constitutional provisions."

In Lewis on Eminent Domain (2nd Ed.), Vol. 1, it is said, on page 7, that:

> "The correct view is that the power of eminent domain is not a reserved, but an inherent right, a right which pertains to sovereignty as a necessary, constant and inextinguishable attribute."

And in Corpus Juris it is said:

> "Such right antedates constitutions and exists independent of constitutional provisions, which are only declaratory of previously existing universal law. The right can only be denied or restricted by fundamental law and is 'a right inherent in society.' * * * It is not conferred, but may be recognized or limited by the constitutions, which, aside from requiring that the use for which the power is exercised be a public one, and that compensation be made, operate only upon the mode of exercising the right."
>
> 20 *C. J.* 513.

It is also said in Corpus Juris that:

> "In the absence of a constitutional provision on the subject, the mode of exercising the right of eminent domain is within the discretion of the legislature, untrammeled by any limitation except that the purpose is a public one, and that just compensation be paid or tendered to the

owner of the property taken, and the power to prescribe rules of procedure may be delegated."

20 *C. J.* 874.

The Constitution of the State of Michigan provides, as follows:

"Section 1. Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law.

Section 2. When private property is taken for the use or benefit of the public, the necessity for using such property, and the just compensation to be made therefor, except when to be made by the State, shall be ascertained by a jury of twelve freeholders residing in the vicinity of such property, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law: Provided, that the foregoing provision shall not be construed to apply to the action of commissioners of highway or road commissioners in the official discharge of their duties."

Art. 13, *Constitution of* 1908 *of the State of Michigan.*

Article 5 of the United States Constitution reads:

"Nor shall private property be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In the case of Loomis v. Hartz, 165 Mich. 662, the Court said:

"It should be borne in mind that each state by virtue of its statehood has the right to exercise the power of eminent domain. Barron v. Baltimore, 7 Pet. (U. S.) 243. The exercise of such power is a matter entirely under the control of the legislature, subject to such restrictions as are found in the Constitution. The necessity, the occasion, time and manner of its exercise are wholly legislative questions, with the exception just stated. Swan v. Williams, 2 Mich. 427; Woodmere Cemetery v. Roulo, 104 Mich. 595 (62 N. W. 1010).

In Nichols on Eminent Domain (2nd Edition), 915-917, 920, it is said:

"So also the legislature may delegate to municipal or private corporations the right to determine what public improvements they will construct and to take by eminent domain the land required for such improvements, and the decisions of such corporations upon the utility and necessity of the improvements which they decide to construct cannot be questioned in the courts, except in a plain case of abuse. Similarly, when it has been decided that a public

> improvement shall be constructed, whether the power of eminent domain shall be invoked is not a matter for judicial determination. The owner of the land which it has been decided to take is not entitled to be heard upon the question whether an equally available site was not already in possession of the public, or could be bought elsewhere for less than the fair value of his land * * *. The legislature may, and usually does, delegate the power of selecting the land to be condemned to the public agent that is to do the work. In such case it makes little, if any, difference whether the grant of authority is in terms limited to such land as is 'necessary' for the purpose in view, for a general grant of authority carries the same limitation by implication and in either case the necessity is primarily for the party taking and not for the courts to decide, and the decision of such party is final as long as it acts reasonably and in good faith."

The constitutional rights of the land owner to be protected against a taking without the possibility of necessity are sufficiently guarded by his right to institute proceedings at law or in equity to save his property and to have the taking set aside.

2 *Nichols Eminent Domain* (*2nd Edition*) 911.

The only judicial question that is involved in the exercise of eminent domain, on the question of necessity, is whether the use for which the private property is to be taken is a public use. Thus, the question of whether a taking of private property for public highway purposes is a taking for a public use is a judicial

question; but if it is once determined that the taking for such purpose is the taking for a public use, then the question of whether it is necessary to make a particular public highway improvement and to take certain private property therefor is not a judicial question, but is a legislative question. In the case of Shoemaker v. United States, 147 U. S. 282, 298, it was said:

> "The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation be made."

It has been held in Michigan that: "the taking of the lands of a citizen for a public highway is taking property for the use and benefit of the public," within the meaning of our Constitution.

Truax v. Sterling, 74 *Mich.* 160, 165.
People v. Kimball, 4 *Mich.* 95.

And the United States Supreme Court in a recent case (1922) said:

> "that a taking of property for a highway is a taking for public use has been universally recognized, from time immemorial."

Rindge Co. v. Los Angeles County, 262 *U. S.* 700, 706, 43 *Sup. Ct.* 689.

Indeed, it has been said

> "the primary object for the exercise of eminent domain in any community is the establishment of roads."
>
> 1 *Nichols on Eminent Domain*, 13.

The objection of plaintiff that the State Highway Commissioner is not a proper person to determine necessity is without merit. In Rindge Co., et al., v. Los Angeles County, et al., 262 U. S. 700, supra, the Board of Supervisors declared the highways in question to be for public uses. The California code, involved in that case, made the resolutions of the Board of Supervisors conclusive evidence as to the necessity of the project and this Court said:

> "So construed it was held by that Court (California District Court of Appeals, 53 Cal. App. 166, 200 Pac. 27) not to be objectionable to any provision of the State or Federal Constitutions. By this we are controlled so far as the provisions of the state Constitution are concerned. Fullbrook Irrig. Dist. v. Bradley, supra, 164 U. S. 155, 17 Sup. Ct. 56, 41 L. Ed. 369; Georgia Railway v. Town of Decatur, 262 U. S. 432, 43 Sup. Ct. 613, 67 L. Ed. —, decided today. And, so construed, this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the land owners before such resolution is adopted, or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the legislature and may either be exercised by the legislature or delegated by it to the public officers."

And the Supreme Court of Michigan has held that the determination of necessity by the State Highway Commissioner under the Michigan statute involved in this case does not violate any of the provisions of the Michigan Constitution.

Zeigel v. Genessee County Board of Road Commissioners, 241 *Mich.* 161.

V.

The Statutory Laws and Methods Employed by the State Highway Commissioner to Condemn Appellant's Land Does Not Deprive Him of His Property Without Due Process of Law or Deny to Him the Equal Protection of the Laws.

A. Plaintiff's land is being acquired for public highway purposes.

Appellant argues that the land within the new right of way is being acquired for railroad purposes and not for highway purposes. This is the premise upon which the soundness of his entire argument rests. The defendants, on the other hand, contend that the land taken for the new right of way is necessary for the public highway improvement; that it will be devoted to the public use for which said Woodward avenue is being improved; that the acquisition thereof, whether by purchase or condemnation, is a reasonable adaptation of proper means toward the end of the public use to which said Woodward avenue is being improved and that such public use is a public highway use.

It should be borne in mind that the State of Michigan is engaged in the widening and otherwise improving of a State Trunk Line Road and, in order to com-

plete the project, desires to obtain the present railroad right of way where it parallels and immediately adjoins the highway. The retention of its right of way is essential to the Railway Company to permit it to perform its functions as a carrier engaged in interstate and intrastate commerce, and, while it might itself acquire other land for right of way purposes, it is not bound to do so and the State has no power to condemn the railway right of way longitudinally.

2 *Nichols on Eminent Domain* (*2nd Ed.*) 1000.
Portland R., etc., Co. v. Portland, 181 *Fed.* 632.

There is no statute in Michigan purporting to give the State Highway Commissioner that right.

The State of Michigan itself has undertaken to acquire a new site upon which a line of railroad is to be constructed and which is to be conveyed to the Railway Company in exchange for its old right of way, which, in turn, is required by the State for the completion of the governmental work of improving a State trunk line highway.

In the case of Brown v. U. S., 263 U. S. 78, the United States Government was engaged in an irrigation project in the State of Idaho. It appeared that the greater part of the Town of American Falls would be flooded and Congress authorized the Commissioners having the matter in charge to acquire, by purchase or condemnation, land for another town site, to plat it in blocks and lots, to construct and improve streets, alleys, sewers, water mains, and all other usual city facilities, and to exchange lots in the new town site for lots in the old town site. It was there contended, as plaintiff contends here, that the taking of land for the new town site was

not a taking of land for the irrigation project, or for irrigation purposes. Plaintiff, in his brief, there contended that:

> "In condemning this land the Government does not desire to retain it, but to dispose of it, and this disposition by the public is not, and cannot be, a public use. No agent or instrumentality of the Government intends or proposes to use the land in question."

But Chief Justice Taft, who wrote the opinion of the Court, answered the plaintiff's argument as follows:

> "No one would say that a legislative act authorizing a railway company to build a railroad exceeds the constitutional limit by reason of a specific provision that the company may condemn land not only for the right of way, but also additional land adjacent thereto for use as borrow pits in making fills and embankments, or for use as spoil banks or dumps for the earth excavated from tunnels and cuts. *Such adjacent land would certainly be devoted to the public use for which the railway was being constructed.* If so, then the purchase of a town site on which to put the people and buildings of a town that have to be ousted to make the bed of a reservoir would seem to be equally within the constitutional warrant. *The purchase of a site to which the buildings of a town can be moved and salvaged, and the dispossessed owners be given lots in exchange for their old ones, is a reasonable adaptation of proper means toward the end of the public use to which the reservoir is to be devoted.*"

The ultimate intended railroad use of the property to be acquired is only incidental to the primary public highway use. If plaintiff's argument is sound then, as applied to the facts in the Brown case, none of the property in the new town site could have been condemned under the statute providing for the condemnation of property for irrigation purposes but that part to be used for public streets would have been condemned under a statute providing for the condemnation of land for public street purposes; that intended to be used for fire stations would have been condemned under another statute providing for the condemnation of land for fire station purposes; that intended to be used for school purposes would have been condemned under a school condemnation law and that intended to be used for private residences or for private business purposes could not have been condemned at all.

Plaintiff argues that the matter of irrigation in Idaho is of such unusual public importance that a different rule might properly be applied in such cases, but this argument is answered by Pitznogle v. Western Md. R. R. Co., 119 Md. 673, 87 Atl. 917. In that case a Railroad Company, *as a railroad project,* undertook to straighten its right of way and to construct certain yards. It started condemnation proceedings to acquire a piece of land for track and yard purposes. Included in the land to be acquired for such purposes was land used as a private road and the description of land as set up in the condemnation proceedings included a strip of land to be exchanged with the owner of the private road which strip of land was ultimately to be used not for railroad tracks, or for a railroad yard, or for any other railroad facility, but solely as a private road in substitution for the private road required by the Rail-

road Company. If plaintiff's argument in the cases at bar is sound, then, if applied to the Pitznogle case, the Railroad Company could not have condemned the land to be used as a road, but the Court held that such land was being acquired *for railroad purposes,* and in its opinion said:

> "It is not contended by the defendants that the use of the land for railroad purposes is a private and not a public use, but they contend that the use of a part of the land for the location of a private road in substitution for the existing private road, which is to be closed and used by the plaintiff company for railroad purposes, is a private use of said land; and that inasmuch as the petition does not state or designate how much and what part of the entire parcel of land so sought to be condemned is to be used for the location of said private road, and how much and what part is to be used for railroad purposes, the whole must fall. The correctness of this contention must be conceded, should we hold, under the facts and circumstances of this case, that the use of a part of said lands for such private road or way is a private use and not a public use. But is it a private use? * * * Without the use of this road or private way for the purposes that we have mentioned, the plaintiff would be defeated in its proposed plan of straightening its road and of enlarging its yard, and to close this road without substituting for it another road or way would deprive those entitled to its use of the means of reaching the pike from their homes, and they would not be permitted to condemn a private road or way (Arnsperger v.

> Crawford, supra) in substitution for the road lost to them, resulting from its necessary use for railroad purposes, which this court has time and again said was a public, and not a private, use. * * * The condemnation of a part of this land here sought to be condemned for a substitute private road or way is incident to and results from the taking by reason of public necessity, of the existing private road for public use, *and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution.*"

There is certainly nothing so extraordinary, or of such unusual public importance, in the acquiring of property to exchange for a private road desired by a railroad company to straighten its right of way, as to call for the application of any extraordinary rule of law.

In another case, Rogers v. Bradshaw, 20 John. 735, the State of New York was constructing a canal and in order to complete the project in accordance with the plans and specifications therefor it was necessary to take part of a turnpike belonging to a private corporation. We can conceive of no difference between that case and the case at bar, where the State of Michigan is engaged in the improvement of a public highway and in order to complete the project in accordance with the State's plans and specifications it is necessary to take the Railway Company's right of way. In that case, as in this, the State acquired other land, by condemnation, to substitute for the privately owned turnpike, and the Court, in its opinion, said:

> "It was shown in proof, that the route of the

northern canal, at the place in question, was directed by the chief engineer; that the turnpike road adjoining the place where the trespass was alleged to have been committed was unavoidably encroached on by the tract or course of the canal, and that another road was indispensable at that place, and must have been made before the canal was commenced.

Here the question occurs: Were not the Commissioners authorized, by this act, to enter upon the land of the defendant in error, and to use it to the extent and in the manner stated in the record. The Supreme Court have answered the question in the negative, because they say the entry was not for the prosecution of the canal improvements, but to make a substitute for part of the turnpike road, which was broken up and taken for the canal. But if the turnpike road was unavoidably encroached on by the canal, and another road was indispensable at that place, before the canal was commenced, and the land taken was necessary for the road (and all this was proved in the cause), it would seem to follow, as a clear and logical deduction, that *the land taken was necessary for the prosecution of the improvements intended by the act.* It is very certain, according to the testimony, that the improvement of the canal, at the place specified, could not be prosecuted without the road; and if so, *the road was necessary for the improvement.* Besides, the commissioners were made the judges as to what lands were necessary for the prosecution of the improvements.

Upon the very straitened construction set up,

on the part of the defendant in error, it might truly be said that if the course of the canal met a house, or barn, or barrack, or shed, standing in its way, it could not be removed to the right hand or to the left, and placed upon the adjoining land, of the same owner, without committing a trespass upon that land. It might just as well be said, in such case, as it has been said in this, that the new ground taken for the occupation of the building, was not taken for any purpose immediately connected with the canal, but as a substitute for the site of a house or barn, which was broken up and taken for the canal."

In each of the above cases the condemnation proceedings were instituted and carried through to a conclusion under statutes enacted by the legislatures of the respective states providing for the condemnation of lands for the primary purposes for which such lands were to be devoted, that is, in the Brown case the lands condemned for a new town site were acquired under statutes of the State of Idaho providing for the condemning of lands for irrigation purposes. In the Pitznogle case the land condemned by the railroad company to substitute for a private road, required by the railroad company for its relocated line of railroad and yards, was acquired under statutes of the State of Maryland providing for the condemning of lands for railroad purposes, and in the Rogers case the lands condemned to substitute for the privately owned turnpike were acquired under statutes of the State of New York providing for the condemning of land for canal purposes.

We have not been able to find one single case, and in all of the litigation that has been had since the

Woodward avenue widening project was commenced not one single case has been called to our attention, or to the attention of any court, contrary to the Brown, Pitznogle and Rogers cases above referred to, and we submit that on the authority of said cases this Court should hold that plaintiff's lands and property rights, if any, are necessary for the public highway improvement, i. e., the widening of Woodward avenue; that they will be devoted to the use for which said Woodward avenue is being improved; that the acquisition thereof by condemnation is a reasonable adaptation of proper means toward the end of the public use to which said Woodward avenue is being improved and that such public use is a public highway use.

B. Plaintiff's lands may be acquired by the State Highway Commissioner under, and in accordance with, the General Highway Condemnation Laws of the State of Michigan without violating any of the provisions of the Constitution of the United States.

We have shown above that plaintiff's lands are being taken for a public highway purpose. Under the authority of Brown v. U. S., 263 U. S. 78; Pitznogle v. Western Md. R. R. Co., 119 Md. 673, 87 Atl. 917, and Rogers v. Bradshaw, 20 Johnson (N. Y.) 735, such lands and claimed property rights may be acquired under any statutes of the State of Michigan which provide for the condemnation of lands for public highway purposes. This would be true even though Act. No. 340 of the Public Acts of 1927 of the State of Michigan, the Act authorizing the contract between the State and the Railway Company, contained no reference whatever to the acquisition, by purchase or condemnation, of the

lands needed for the new right of way. Said Act No. 340 of the Public Acts of 1927 does, however, contain such a reference. Section 4 of said Act is as follows:

> "The changes and improvements contemplated by this Act and said proposed contract, and the taking of the lands described in said contract for the new right of way of said railroad company, including the additional lands described therein necessary for depot and yard purposes at Birmingham and all other lands necessary or required to carry out this Act and said proposed contract, are hereby declared to be a public necessity, *and the State Highway Commissioner is hereby authorized and empowered to acquire the same on behalf of the State by purchase or condemnation in accordance with the general laws of the State of Michigan.*"

The General Highway Condemnation Law in force and effect at the time said Act No. 340 of the Public Acts of 1927 was passed was Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, and Act No. 215 of the Public Acts of 1925. Said Act No. 352 of the Public Acts of 1925, as amended, provides the manner by which township highway commissioners, boards of county road commissioners, and the state highway commissioner may acquire property for public highway purposes. Section 1 thereof lists a number of specific highway purposes for which the Act may be used, namely:

(a) Property for the right of way of any road to be laid out, altered or widened, or for changing the line thereof.

(b) Gravel, rock, sand, dirt, and all other materials that may be needed for the proper construction, improvement and maintenance of a road.

(c) Property deemed necessary to provide for clear vision at intersections of highways with each other or with railroads.

(d) Property deemed necessary to change the channel of water courses, natural or artificial, in order to maintain a proper alignment for any road without crossing such water course, and the riparian rights of any person, firm or corporation in or pertaining to any such water course.

(e) Land necessary to be acquired for the storage of road machinery, equipment or materials.

(f) *"Any and all other property and property rights deemed by the commissioner or commissioners having jurisdiction over a road to be necessary for the proper construction, improvement or maintenance thereof."*

Plaintiff's property is deemed necessary by the State Highway Commissioner for the proper improvement of Woodward avenue.

Section 23 of said highway condemnation statute provides that:

> "The provisions of this chapter shall be deemed to extend to, and include, the right * * * to acquire and take property desired by the commissioner or commissioners (in this case the State Highway Commissioner) to exchange for other property which in his or their opinion it is necessary to acquire for public highway purposes, whenever he or they have agreed in writing with the owner or owners of such property for such exchange."

Therefore, either under the general provisions of paragraph (f) of Section 1 of said condemnation statute, or the specific provisions of Sec. 23 of said statute, the State Highway Commissioner is authorized and empowered to acquire plaintiff's lands for the purpose described in said Act No. 340 of the Public Acts of 1927.

There is also another general law of the State of Michigan which specifically authorizes the State Highway Commissioner to condemn plaintiff's lands under the General Highway Condemnation Laws. The law referred to is Act No. 215 of the Public Acts of 1925 of the State of Michigan. Sections 1 and 2 of this Act are as follows:

> "Section 1. Whenever the line of any railroad or railway company is upon or adjacent to the right of way of a trunk line highway and such right of way, or any part thereof, is necessary to be acquired for widening, straightening, altering, or otherwise improving, such highway, the State Highway Commissioner shall be authorized to enter into negotiations with such railroad or railway company for the purchase of said right of way, or of any part thereof, and to enter into an agreement with any such railroad or railway company to exchange other designated property for such right of way, or for any part thereof, whenever such other designated property shall be acquired by him; and whenever any such agreement has been entered into, the State Highway Commissioner shall be authorized, and he is hereby empowered, to acquire such other property by purchase or condemnation, and when acquired to execute the necessary conveyances and releases thereof to such railroad or railway com-

pany for its use, and to take in exchange therefor the railroad or railway right of way, or part thereof, for such public highway purposes in accordance with such agreement.

Section 2. The procedure that is, or may be, prescribed for condemnation proceedings instituted by boards of county road commissioners or the procedure that is, or may be, provided for the condemnation by state agencies and public corporations, of private property for the use or benefit of the public, is hereby expressly made applicable to any proceedings brought by the State Highway Commissioner under the provisions of this Act."

Said Act No. 215 of the Public Acts of 1925 was passed before Act No. 352 of the Public Acts of 1925, and at that time the procedure followed by the State Highway Commissioner for the condemning of lands for public highway purposes was that by which boards of county road commissioners were authorized to acquire property for public highway purposes, namely, Sections 4357-4362, inclusive, of the Compiled Laws of 1915 of the State of Michigan. The authority of the State Highway Commissioner at that time to use the county road law for condemnation purposes was given in Section 2 (b) of Chapter 5 of Act No. 283 of the Public Acts of 1909 of the State of Michigan, as amended by Act No. 367 of the Public Acts of 1921, which provided that:

"The procedure that is, or may be, prescribed, for condemnation proceedings instituted by boards of county road commissioners, is hereby expressly made applicable to such a proceeding when brought by the State Highway Commissioner.

> Such right of purchase or condemnation shall be deemed to exist in the case of the construction or maintenance of any road built or improved solely by the State, or by the State with Federal aid, or by the State in conjunction with any municipalities of the State."

In a few instances the State Highway Commissioner had also acquired land for public highway purposes under the authority of Act No. 149 of the Public Acts of 1911 of the State of Michigan, being Sections 353 to 373, inclusive, of the Compiled Laws of 1915, entitled

> "An Act to Provide for the Condemnation by State Agencies and Public Corporations of Private Property for the Use or Benefit of the Public, and to Define the Terms 'Public Corporations,' 'State Agencies,' and 'Private Property' as used herein."

Because of the use by the State Highway Commissioner of said Act No. 149 of the Public Acts of 1911 to acquire land for public highway purposes, the said State Highway Commissioner, for such purposes, acting as a state agency, Act No. 215 of the Public Acts of 1925 was so worded as to authorize and empower the said State Highway Commissioner to use said Act No. 149 of the Public Acts of 1911 to acquire property desired by him to exchange for a right of way, or part thereof.

Plaintiff contends that because of the use of the words "public corporations" in Section 2 of said Act No. 215 of the Public Acts of 1925, the Legislature intended that in cases like the case at bar the State Highway Commissioner should use the railroad condemnation laws. There are two answers to that argu-

ment: First, the Act relates only to the acquiring of property to exchange for a right of way, or a part thereof, of a railroad company, and Section 2 expressly provides for the use of the procedure that is or may be prescribed for condemnation proceedings instituted by boards of county road commissioners. Second, the only definition of the term "public corporations" in any condemnation law of the State of Michigan is that given in Section 1 of said Act No. 149 of the Public Acts of 1911, wherein the term is defined to mean "all boards, commissions and agencies made corporations for the management and control of public business and property." This definition does not include railroad companies. Furthermore, said Act No. 215 of the Public Acts of 1925 has been interpreted by the Supreme Court of the State of Michigan as authorizing the State Highway Commissioner to use the General Highway Condemnation Law, to-wit, Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, to acquire by condemnation the lands necessary for the purposes described in Act No. 340 of the Public Acts of 1927 and the contract thereby authorized between the State and the Railway Company.

Fitzsimmons & Galvin, Inc., v. Rogers, 243 *Mich.* 649.

Johnstone v. Detroit, Grand Haven & Milwaukee Ry. Co., et al., 245 *Mich.* 65.

This is a matter of procedure that is binding upon the Federal Courts.

Thorington v. Montgomery, 147 *U. S.* 492.
Ballard v. Hunter, 204 *U. S.* 258.
Cross v. North Carolina, 132 *U. S.* 140.
Simon v. Craft, 182 *U. S.* 436.

Stevens v. Nichols, 157 *U. S.* 371.
Sawyer v. Piper, 189 *U. S.* 157.
Iowa Central R. R. Co. v. Iowa, 160 *U. S.* 393.
Rothchild v. Knight, 184 *U. S.* 334.

Appellant contends that said Act. No. 215 of the Public Acts of 1925 was passed for no other purpose except to authorize the State Highway Commissioner to use the General Highway Condemnation Law to condemn lands necessary for the new right of way. Even if this were so, it would not be objectionable under the United States Constitution, but it is not true. There are scores of places in the State of Michigan where railroads and highways are immediately adjacent and parallel to each other and the Act was passed as a general law to enable the State Highway Commissioner in any such instance to contract for the acquiring of such rights of way, or parts thereof, as might be necessary for highway purposes and to substitute therefor such additional land as might be necessary for railroad purposes. The matter of public highway construction and improvement has been in a stage of evolution for several years. Projects which a few years ago would have been considered as fantastic and unreasonable are now matters of every day consideration, and as one of the steps in the evolution of highway construction, improvement and maintenance in the State of Michiga, Act No. 215 of the Public Acts of 1925 was enacted. There are places from one end of the State to the other where the Act may be used. The fact that this happens to be the first case which has reached the courts involving the use of said Act is no reason why it should be considered as a special act. It is, in fact, a general law of the State.

C. The equal-protection-of-the-laws and due-process clauses of the Fourteenth Amendment to the United States Constitution are not being violated.

Plaintiff's counsel have argued at length that condemnation under and pursuant to Act No. 352 of the Public Acts of 1925, as amended by Act No. 92 of the Public Acts of 1927, as authorized by said Act No. 340 of the Public Acts of 1927, and Act No. 215 of the Public Acts of 1925, is unconstitutional, in that plaintiff is denied the equal protection of the laws as prohibited by the Fourteenth Amendment to the Constitution of the United States.

We understand plaintiff's argument to be that because the procedure established in Chapter 157 of the Compiled Laws of 1915 of the State of Michigan, known as the General Railroad Law, for the condemnation of private property for railroad purposes, provides for a trial by jury, for an attorney fee, and for a general appeal and has been interpreted by the Supreme Court of Michigan as not authorizing the offsetting of benefits, as distinguished from the General Highway Condemnation Law, which provides for a determination of the necessity of the project and of taking particular property for that project by the State Highway Commissioner, for the determination of the damages to be paid as compensation for the taking of property for public highway purposes by three court commissioners appointed by a court of record, for a review by certiorari instead of by appeal, and which permits the offsetting of benefits, in cases where there are benefits, plaintiff will be denied the equal protection of the laws if his property is condemned under the highway condemnation laws instead of under

the railroad laws. As mentioned above, in Subdivision V A of this brief, plaintiff's argument in this respect is based upon a false premise, namely that his lands are being acquired for railroad purposes, whereas, as a matter of fact and of law, they are being acquired for public highway purposes. On the authority of the cases referred to and quoted from in said Subdivision V A of this brief, we might well rest our case on that one proposition, but plaintiff is obviously wrong, even though, for the sake of argument, the premise is assumed to be true.

The advantages, if any, given to property owners under the General Railroad Condemnation Law, as distinguished from the General Highway Condemnation Law, *are not rights guaranteed to them under either the State or Federal Constitutions.* The General Highway Condemnation Law does not deny to any person any right guaranteed by the Constitution.

If the objections to the offsetting of benefits is good in these cases, then the same objection could be made to the offsetting of benefits in any highway condemnation case where no special assessments for benefits are to be made on account of the project. Such an objection was made in the case of McCoy v. Union Elevated R. R. Co., 247 U. S. 354, 38 Sup. Ct. Rep. 504, the specific objections being that the condemnation proceedings denied to petitioners the equal protection of the laws and deprived them of property without due process of law, in violation of the Fourteenth Amendment. As to the objection that the proceedings denied to petitioners the equal protection of the laws, the Court merely said:

"Nothing in the record affords support for the second (this) claim."

As to the objection that the proceedings deprived petitioners of their property without due process of law, the Court said:

"We may examine proceedings in the state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation. If the necessary result was to deprive him of property without such compensation, then due process of law was denied him, contrary to the Fourteenth Amendment. Chicago, Burlington, Etc. R. R. Co. v. Chicago, 166 U. S. 226, 246, 17 Sup. Ct. 581, 41 L. Ed. 979; Backus v. Ft. Street Union Depot Co., 169 U. S. 557, 565, 18 Sup. Ct. 445, 42 L. Ed. 853; Fayerweather v. Ritch, 195 U. S. 276, 298, 25 Sup. Ct. 58, 49 L. Ed. 193. Our concern is not to ascertain whether the rule adopted by the state is the one best supported by reason or authority nor with mere errors in course of trial, but with denial of a fundamental right. Appleby v. Buffalo, 221 U. S. 524, 532, 31 Sup. Ct. 699, 55 L. Ed. 838. And see McGovern v. N. Y., 229 U. S. 363, 371, 33 Sup. Ct. 876, 57 L. Ed. 1228, 46 L. R. A. (N. S.) 391. And here it must be noted that the claim is for damages to property not actually taken from the owner's dominion.

* * * *

"The fundamental right guaranteed by the Fourteenth Amendment is that the owner shall

not be deprived of the market value of his property under a rule of law which makes it impossible for him to obtain just compensation. *There is no guaranty that he shall derive a positive pecuniary advantage from a public work whenever a neighbor does.* It is almost universally held that in arriving at the amount of damage to property not taken allowance should be made for peculiar and individual benefits conferred upon it; compensation to the owner in that form is permissible, and we are unable to say that he suffers deprivation of any fundamental right when a state goes one step further and permits consideration of actual benefits—enhancement in market value—flowing directly from a public work, although all in the neighborhood receive like advantages. In such case the owner really loses nothing which he had before; and it may be said with reason there has been no real injury.

"This subject was much discussed in Bauman v. Ross, 167 U. S. 548, 574, 584, 17 Sup. Ct. 966, 976, 42 L. Ed. 270. Through Mr. Justice Gray we there said: 'The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public. Consequently, when part only of a parcel of land is taken for a highway the value of that part is not the sole measure of the compensation or damages to be paid to

the ower; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account. When, on the other hand, the part which he retains is specially and directly increased in value by the public improvement, the damages to the whole parcel by the appropriation of part of it are lessened. * * * The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of Congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the compensation or damages due to the owner, whether for the value of the part taken or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits capable of present estimate and reasonable computation, caused by the establishment of a highway to the part not taken.' "

The syllabus to the McCoy case, supra, reads, in part, as follows:

"The owner of realty injured by the construc-

> tion and operation of an elevated railroad was not deprived of his property without due process of law in violation of the Fourteenth Amendment because benefits resulting from the increased travel were considered in determining whether the premises had been damaged, though other lands in the neighborhood were similarly benefited, for the right guaranteed is merely that the owner shall not be deprived of the market value of his property, under a rule of law making it impossible for him to obtain just compensation, and there is no guaranty that he shall derive a positive pecuniary advantage from a public work whenever a neighbor does."

In the case of Joslin Mfg. Co. v. City of Providence, 262 U. S. 668, 43 Sup. Ct. Rep. 684, the Court had under consideration the laws of Rhode Island, 1915, C. 1278, providing for condemnation of water rights and other property for the purpose of a water supply for the City of Providence. Suits were brought in equity by several plaintiffs to enjoin the City from taking possession of, or interfering with, their property. The Court, in its opinion, said:

> "The Act, it is asserted, denies the equal protection of the laws, among other things, by permitting the owner of a business established prior to the passage of the Act to recover for injury thereto while withholding such compensation from one whose business has been established since, and by allowing a mill owner to recover the cost of removing his machinery to a new location within the New England States, while denying a similar right to one desiring to move

to a location elsewhere. It is further asserted by plaintiffs in error, in their capacity as taxpayers, that the effect of allowing these and other consequential damages is to deprive them of their property without due process of law.

Injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation (Cox v. Philadelphia, etc., R. R. Co., 215 Pa. 506, 64 Atl. 729, 114 Am. St. Rep. 979; 2 Lewis on Eminent Domain, 3rd Ed. Sec. 1727) in the absence of a statute expressly allowing it. Whiting v. Commonwealth, 196 Mass. 468, 82 N. E. 670; Oakland v. Pacific Coast Lbr. Co., 171 Cal. 392, 398, 153 Pac. 705). *This statute, therefore, does not deny a right, it grants one,* and limits it to a business already established. We cannot say that such a classification is unreasonable or arbitrary—and certainly it is not clearly so.

* * * *

In respect of the contention that the statute extends the right to recover compensation, so as to include these and other forms of consequential damages, and thus deprives plaintiffs in error, as taxpayers of the City, of their property without due process of law, we need say no more than that, while the Legislature was powerless to *diminish* the constitutional measure of just compensation, we are aware of no rule which stands in the way of an *extension* of it, within the limits of equity and justice, *so as to include rights otherwise excluded.* As stated by the Supreme Judicial Court of Massachusetts, in Earle

v. Commonwealth, 180 Mass. 579, 583, 63 N. E. 10 (57 L. R. A. 292, 91 Am. St. Rep. 326), speaking through Mr. Justice Holmes, who was then a member of that Court: 'Very likely the * * rights were of a kind that might have been damaged if not destroyed without the constitutional necessity of compensation. But some latitude is allowed to the Legislature. It is not forbidden to be just in some cases where it is not required to be by the letter of paramount law.' "

The most that can be argued for plaintiff is that it is not just or equitable to offset benefits against the damages that would otherwise be payable as compensation for the taking of portions of his property, but this is an argument to be addressed to the Legislature and not to the courts, and the fact that the Legislature has seen fit in the railroad condemnation law not to authorize the offsetting of benefits does not mean that the plaintiff, or others similarly situated, have been, or will be, denied any fundamental right. *The railroad condemnation laws merely grant to property owners certain privileges which they are not constitutionally entitled to.* The highway condemnation law limits property owners more nearly to their constitutional rights, but it gives to all property owners all of the rights guaranteed by the Constitution.

In the case of Backus v. Ft. Street Union Depot Co., 169 U. S. 557, 568, 18 Sup. Ct. 445, 42 L. Ed. 853, a case which arose in the State of Michigan, the Court said, in part:

"Neither was there anything in the proceedings actually had before the last jury and in the

Circuit Court which conflicts with any mandate of the Federal Constitution. Counsel say that the respondents were entitled to a trial by jury of inquest, but were forced to trial before a common law jury, presided over and controlled by the circuit judge, but the Constitution of the United States does not forbid a trial of the question of the amount of compensation before an ordinary common law jury, or require, on the other hand, that it must be before such a jury. It is within the power of the State to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way; or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge. *These are questions of procedure which do not enter into or form the basis of fundamental right.* All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there if that due process of law which is required by Federal Constitution. Bauman v. Ross, 167 U. S. 548, 593."

We have pointed out above that the right of eminent domain is a right incident to sovereignty and that it exists independent of, and in fact antedates, all constitutional and statutory provisions. It is restricted only as the constitution or the statues prescribing procedure may do so. So long as the statute provides that in some appropriate way before some properly consti-

tuted tribunal inquiry shall be made as to the amou of compensation, the mandates of the Fourteen Amendment to the Federal Constitution are satisfi The determination of the amount of the damages a what shall be considered in determining such amou in each particular form of proceeding is a matter procedure and not a fundamental right. Whether ben fits shall be offset or not is a matter of procedure a not a fundamental right.

State Highway Comr. v. Breisacher, 231 *Mi* 317, 322.

In this State the General Highway Laws providi for the discontinuing and laying out of township roa (Sec. 23 of Chapter 1 of Act No. 283 of the Pub Acts of 1919; Sec. 4310, Compiled Laws of 1915, of t State of Michigan) reads, in part, as follows:

> "If any discontinued highway shall be up lands through which a new highway shall be la out, the same may be taken into considerati in estimating the damages sustained by t owner of such lands; and in like manner t benefits accruing to owners of lands by reas of laying out or altering any highway shall taken into consideration."

Until Act No. 352 of the Public Acts of 1925 beca effective, there was no provision in the county road l which authorized the considering of benefits in t determination of the damages to be paid as comp sation for the taking of property for county roa In like manner there was no authority for the St Highway Commissioner to consider benefits in c demning land for state trunk line highways when s

Act No. 352 of the Public Acts of 1925 became effective.

See:

State Highway Comr. v. Breisacher, supra.

If plaintiff's argument in regard to the offsetting of benefits against the damages which they might otherwise be entitled to is sound, then, as applied to the acquiring of land for public highway purposes in the State of Michigan, every person from whom land was taken for township road purposes before Act No. 352 of the Public Acts of 1925 became effective was denied the equal protection of the laws because benefits were offset as against him, whereas lands taken for county road purposes and state trunk line highways were taken under a procedure which did not permit offsetting of benefits.

State Highway Commissioner v. Breisacher, 231 *Mich.* 317.

After the decision of the Court in State Highway Commissioner v. Breisacher, supra, the legislature amended the law then applicable to condemnation of land by Boards of County Road Commissioners by expressly authorizing offsetting of benefits.

Act No. 191 of the Public Acts of 1925 of Michigan.

Counsel for appellant has referred to the recent case of in re Widening of Bagley Avenue, 248 Mich. 1, as authority for the proposition that benefits cannot be deducted in a street widening case. The situation there was entirely different than in the case at bar, in that the street widening project involved in that case was in the

City of Detroit, which, under its charter, forms special assessment districts to defray the cost or a part thereof, of street widening projects. In such cases benefits cannot be offset because to do so would be equivalent to charging a land owner, from whom a parcel is taken, twice for the same benefit. This is fully explained in the case of City of Detroit vs. Loula, 227 Mich. 191. The Bagley Avenue Widening case, therefore, has no application whatever to the case at bar, where the law does not provide for the forming of a special assessment district.

Furthermore, the Railroad Condemnation Law has now been amended to specifically provide that, when land is being taken by a railroad company for railroad purposes, "benefits arising out of and created by the public purpose for which property may be taken under the provisions of this Act, accruing to the owners of land or lands, or property rights, by reason of such public use of the property taken, shall be taken into consideration in determining the damages to be paid to any such owner as compensation for the taking of his property for any such public purpose."

Act 140 of the Public Acts of 1929 of Michigan.

We, therefore, respectfully submit that there is no merit in appellant's contention that the proceedings in question deny to him the equal protection of the laws, or that his property is being taken without due process of law.

D. Act No. 340 of the Public Acts of 1927 does not constitute an arbitrary, unreasonable classification.

In 6 R. C. L. 384, it is said:

> "In the exercise of its power to make classifications for the purpose of enacting laws over matters within its jurisdiction, the state is recognized as enjoying a wide range of discretion. *The question of classification is primarily for the Legislature, and it can never become a judicial question except for the purpose of determining, in any given situation, whether the legislative action is clearly unreasonable.*"

In 6 R. C. L. 380, it is said:

> "But if the classification is not wholly unreasonable and arbitrary, so that the statute is uniform in its operation on all the members of the class to which it is made applicable, no one is denied the equal protection of the laws guaranteed by the Federal Constitution. *It has been said that it will be upheld unless it is so manifestly inequitable and unjust that it will cause an imposition of burdens on one class to the exclusion of another without reasonable distinction.*"

And in 6 R. C. L. 385, it is said:

> "Before a court can interfere with the legislative judgment, it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched. *When the classification in a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.*"

Attention is again called to the case of Joslin Mfg. Co. vs. City of Providence, 262 U. S. 668, 43 Sup. Ct. Rep. 684, wherein the act of the legislature was attacked because it permitted the owner of a business established prior to the passage of the act to recover for injury thereto while withholding such compensation from one whose business had been established since and because it allowed a mill owner to recover the cost of removing his machinery to a new location within the New England States while denying a similar right to one desiring to move to a location elsewhere. The plaintiffs in that case claimed that because of these provisions of the act they were deprived of the equal protection of the laws, but the Court said:

> "We cannot say that such a classification is unreasonable or arbitrary—and certainly it is not clearly so. * * * The Legislature evidently found a sufficient and proper basis for classification and we are not prepared to say that its conclusion was so palpably arbitrary as to fall within the provisions of the Fourteenth Amendment. See Ark. Natural Gas Co. vs. Ark. R. R. Comm., 261 U. S. 379, 43 Sup. Ct. 387, 67 L. Ed., March 19, 1923, and cases cited."

Act No. 215 of the Public Acts of 1925 is a general law of the state. There are innumerable instances in the State of Michigan where its provisions may be made use of. In such cases, as in the case at bar, the proceedings will require an expenditure of public moneys for public highway purposes. The Act contemplates a procedure in which a railroad company is not the moving party; a procedure in which the public is the party primarily interested; a proceeding in which the public interest is for a highway improve-

ment, and a procedure which presumably would never be commenced by the railroad company to acquire a new right of way upon which to relocate its railroad, it being a matter of public highway concern, initiated by the State, through its agent, the State Highway Commissioner, for the purpose of improving a public highway to relieve highway traffic congestion and provide for the safety, convenience and general welfare of the public traveling upon the public highways and not for any railroad improvement. It is clearly not an unreasonable classification. We submit that, on the contrary, it is a logical and proper classification and that the courts should so find.

We submit, therefore, that plaintiff's lands, or, in the Walton case, claimed property rights, may be acquired by the State Highway Commissioner under, and in accordance with, the General Highway Condemnation Laws of the State of Michigan without violating the Equal-Protection-of-the-Laws Clause of the Federal Constitution or any other constitutional right, and that there has not been and there is not now any threatened unconstitutional invasion of any fundamental rights.

VI.

Plaintiff Has an Adequate Remedy at Law.

Proceedings were commenced by the State Highway Commissioner in April, 1928, to acquire portions of the plaintiff's lands and property rights for the new right of way. A hearing on the question of necessity was held, at which the appellant was present.

A determination of necessity was made following the

hearing in April, 1928. If the plaintiff considered that said proceedings violated any of his constitutional rights he had a remedy at law at that time, i. e., a review in the Supreme Court of the State of Michigan by certiorari, and if the Supreme Court of the State of Michigan should have decided adversely to his contentions he could then have reviewed that decision in the Supreme Court of the United States. The plaintiff did file a petition for certiorari in the Supreme Court of the State of Michigan, in which he raised substantially the same constitutional questions as are raised here, but later withdrew the petition. He had the right to a review at that time, *before possession was taken.* The fact that he did not pursue that remedy is not material. The material part is that he had the remedy and permitted the State Highway Commissioner to take possession of the property and do certain work thereon preparatory to actual grading for the new right of way.

On the question of the proper rule of damages to be applied (and we submit that this is the plaintiff's real objection to the proceeding), he has an adequate remedy at law. The proceedings before the Probate Court for Oakland County, Michigan, restrained by the lower Court's order on the petition of the plaintiff, was a proceeding instituted by petition of the State Highway Commissioner for the appointment of three court commissioners to hear the parties, view the premises and determine the damages to be paid as compensation. If the State Highway Commissioner is permitted to proceed, plaintiff will have an opportunity to be fully heard before the court commissioners. If the court commissioners determine the amount of damages to be paid as compensation upon an erroneous theory

of the law, or on a basis claimed by plaintiff to be contrary to law, or to be violative of the Federal Constitution, he may have that determination reviewed in the Supreme Court of the State of Michigan by certiorari, and if plaintiff is dissatisfied with the opinion of the Supreme Court of the State of Michigan on any constitutional question he may have that decision reviewed in the United States Supreme Court.

His remedy, therefore, is full, adequate and complete and there is no occasion for the intervention of a court of equity. His argument that the State Highway Commissioner has already taken possession and has already damaged his property, and that for such damage he can sue neither the State nor the Railway Company in an action at law, is not an answer to our contention in this respect because plaintiff could have raised his constitutional objection at the hearing on the question of necessity and, upon filing his application for a writ of certiorari, could have obtained a restraining order from the Supreme Court of the State of Michigan, which is exactly what was done in the case of Fitzsimmons & Galvin, Inc. vs. Rogers, 243 Mich. 649. *The remedy at law existed, and does exist, and if plaintiff has suffered any damage it is because of his own laches.*

VII.

The Highway Condemnation Law Is Not Unconstitutional in Authorizing Possession to Be Taken Before the Damages Are Determined.

It is also argued in appellant's brief that the provisions of Section 6 of the highway condemnation law, which authorizes the State Highway Commissioner to take possession before the damages are determined, is

unconstitutional. In this connection, it should be borne in mind that the State Highway Commissioner has made a determination of the damages which, in his opinion, should be paid as compensation for the taking of the plaintiff's property. The amount so determined by him was tendered to the plaintiff and the tender was refused. It was thereupon deposited with the State Treasurer to secure to the plaintiff his just compensation. The same argument was made in Backus vs. Fort St. Union Depot Co., 169 U. S. 563, but the Court disposed of the argument as follows:

> "The argument is that the property owner has a constitutional right to have the amount of his compensation finally determined and paid before yielding possession; that the party seeking condemnation (in this case the Depot Company) cannot be let into possession until after all question as to the compensation has been finally settled, and the amount thereof paid; that it cannot take advantage of one report or verdict, pay the sum fixed by it, obtain possession, and still litigate the question of amount; that if it does then pay and take possession its right to further litigate is ended. But the Supreme Court of the state held against this contention, and we must assume therefrom that it is not warranted by the Constitution and statutes of the state. Indeed, the language of that Constitution is, 'made or secured.' Does this amount to a denial of the right to that protection to property which is guaranteed by the Fourteenth Amendment to the Federal Constitution? In other words, is it beyond the power of a state to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and

payment thereof? This question is fully answered by the opinions of this court in Cherokee Nation vs. Southern Kansas Railway, 135 U. S. 641, and Sweet vs. Rachel, 159 U. S. 380. *There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof.*

Neither can it be said that there is any fundamental right secured by the Constitution of the United States to have the questions of compensation and necessity both passed upon by one and the same jury. In many states the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the Legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. Mississippi & Rum River Boom Co. vs. Patterson, 98 U. S. 402, 405; U. S. vs. Jones, 109 U. S. 513; Cherokee Nation vs. Southern Kansas Railway Company, supra.

Neither was there anything in the proceedings actually had before the last jury and in the circuit court which conflicts with any mandate of the Federal Constitution. Counsel say that the respondents were entitled to a trial by a jury of inquest, but were forced to trial before a common-law jury, presided over and controlled by the circuit judge. But the Constitution of the United States does not forbid a trial of the question of

> the amount of compensation before an ordinary common-law jury, or require, on the other hand, that it must be before such a jury. *It is within the power of the state to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way;* or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common-law, without the presence of a trial judge. *These are questions of procedure which do not enter into or form the basis of fundamental right.* All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by Federal Constitution.—Bauman vs. Ross, 167 U. S. 548, 593."

And in the case of Rindge Co. vs. Los Angeles Co., 262 U. S. 700, which involved the constitutionality of a highway condemnation law substantially the same as Act No. 352 of the Public Acts of 1925 of the State of Michigan, the Court said:

> "2. Public necessity for the taking. We necessarily accept, as a matter of state law, the holding of the district court of appeal that the proviso to paragraph 1241 of the Code made the resolutions of the board of supervisors conclusive evidence as to the necessity of taking these particular highways and the other matters therein specified. So construed it was held by that court not to be objectionable to any provision of the state or Federal Constitutions. *By this we are controlled so far as the provisions* (709) *of the*

state Constitution are concerned. Fallbrook Irrig. Dist. vs. Bradley, supra, p. 155; Georgia R. & P. Co. vs. Decatur (265 U. S. 432, ante, 1065, 43 Sup. Ct. Rep. 613). And, so construed, this statute is *not in conflict with the Fourteenth Amendment,* either because it fails to provide for a hearing by the landowners before such resolution is adopted, or otherwise. *The necessity for appropriating private property for public use is not a judicial question.* This power resides in the Legislature, and may either be exercised by the Legislature *or delegated by it to public officers.* 'Where intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment.' Bragg vs. Weaver, 251 U. S. 57, 58, 64 L. Ed. 135, 136, 40 Sup. Ct. Rep. 62. 'That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. Neither is it any longer open to question in this court that the legislature may confer upon a municipality the authority to determine such necessity for itself. *The question is purely political, does not require a hearing, and is not the subject of judicial inquiry.*' Joslin Mfg. Co. vs. Providence, decided today (262 U. S. 668, ante, 1167, 43 Sup. Ct. Rep. 684)."

Plaintiff's argument as to the desirability of such a law should more appropriately be directed to the Legislature than to the courts. It is purely a legislative question.

It is also claimed that the declaration in Section 4 o
Act No. 340 of the Public Acts of 1927 that—

> "the changes and improvements contemplated b
> this Act and the said proposed contract, and th
> taking of the lands described in said contract, fo
> the new right of way of said railroad company
> including the additional land described therei
> necessary for depot and yard purposes at Bir
> mingham, and all other lands necessary or re
> quired to carry out this Act, and said propose
> contract, are hereby declared to be a publi
> necessity, * * *"

violates Sections 1 and 2 of Article 13 of the Constitu
tion of the State of Michigan. The Supreme Court o
the State of Michigan has held otherwise.

> *Ziegel vs. Genessee Co. Board of Road Comrs*
> 241 *Mich.* 161.

The holding of the Michigan Supreme Court in thi
respect is controlling on the Federal Court.

> *Rindge Co. vs. Los Angeles Co.*, 262 *U. S.* 70

We have already discussed, and will not here repea
the proposition that the right of trial by jury, as di
tinguished from a determination by court commissio
ers, the right of a general appeal as distinguished fro
review by certiorari, and other claimed advantag
of the General Railroad Condemnation Law of t
State of Michigan over the General Highway Conde
nation Law, are not rights guaranteed to proper
owners under the Fourteenth Amendment, but are mer
extra considerations granted by the Legislature with
its discretion. The General Highway Condemnati
Law, as applied to plaintiff's case, does not deprive t

plaintiff of any fundamental rights, privileges or immunities but merely means that plaintiff will not be permitted to make as much of a monetary profit out of the proposed improvement as he would otherwise hope to get.

VIII.

There Is No Relationship of Principal and Agent Between the State and the Railway Company in This Proceeding.

A large part of appellant's brief is taken up with a discussion based upon a presumption that the State, in the acquiring of land for the new right of way, is acting as an agent of the Railway Company. Nothing could be further from the truth. We have already shown to the Court that the entire project, as described in Act No. 340 of the Public Acts of 1927, is a State project, initiated by the State, and that the only way that the Railway Company enters into the matter at all is because the State succeeded in negotiating a contract with the Railway Company by which the Railway Company agreed to convey to the State its present right of way in order to enable the State to complete its highway improvement project, after the State, as a State project, has acquired and equipped a new right of way so that the Railway Company can perform its functions as a common carrier. The appellant then argues that the State and the Railway Company are joint adventurers. What has already been said answers this argument.

SUMMARY.

In conclusion, we submit:

1. That the order dismissing appellant's bill of com plaint was properly entered.

2. That Act No. 340 of the Public Acts of 1927 o Michigan and the Contract between the State of Mich igan and Detroit, Grand Haven and Milwaukee Railwa Company therein authorized do not place appellant i an arbitrary, discriminate or unreasonable class, but that, on the contrary, it authorizes the taking of appel lant's property by the State Highway Commissione for public highway purposes, and, in making applicabl the General Highway Condemnation Laws of Michigan it accords the appellant all of his constitutional right and privileges; it does not in any way deny to him th equal protection of the laws and it does not deprive hi of his property without due process of law.

3. That Act No. 215 of the Public Acts of 1925 is general law and does not deprive plaintiff of any of hi constitutional rights or privileges and the application o its provisions does not deny to plaintiff the equal pro tection of the laws or deprive him of his propert without due process of law.

4. That Act No. 352 of the Public Acts of 1925, a amended by Act No. 92 of the Public Acts of 1927, a applied to the taking of appellant's property for th public highway purpose described in Act No. 340 o the Public Acts of 1927, does not deprive plaintiff o any of his constitutional rights or privileges; it doe not deny to him the equal protection of the laws o deprive him of his property without due process of la

5. That the question of necessity has been properly determined in accordance with the applicable laws of the State of Michigan; it is not a judicial question and is not involved in this case.

6. That appellant has an adequate remedy at law.

We, therefore, respectfully submit that the decree vacating and setting aside the restraining order previously issued herein and dismissing the bill of complaint should be affirmed.

Respectfully submitted,

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